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No. 85-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD POPE and CHARLES G. MORRISON,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF ILLINOIS AND PHE, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

The American Civil Liberties Union is a non-partisan organization of over 250,000 members, dedicated to defending the fundamental liberties guaranteed in the Bill of Rights. The ACLU of Illinois is one of its state affiliates, with more than 12,000 members. The ACLU and its affiliates are devoted to defending freedom of expression under the First Amendment. They actively oppose laws and other official actions which limit the flow of information and the freedom of self-expression which the First Amendment guarantees.

The ACLU opposes all restrictions on the availability of books, films and other media based on their content.

So long as courts permit any such restrictions, the ACLU will oppose all efforts to expand the scope of such restrictions. The argument in this brief, however, is not based on the ACLU's opposition to all content-based restrictions on speech, but on currently recognizable legal principles.

PHE, Inc., is a corporation organized under the laws of North Carolina. It is engaged in the business of mailing various materials it believes are protected by the First Amendment, including sexually explicit magazines and videotapes, throughout the United States. PHE, Inc. only mails such materials to adults, and only upon request. PHE, Inc. does not have any way of ascertaining the community standards concerning "offensiveness," "prurience," or "value" of the countless communities to which it mails materials. Accordingly, unless the judgment below is reversed, it will be forced to cease distribution of a wide range of materials it genuinely believes would not be found offensive, prurient, or lacking value in the vast majority of all American communities, simply because these materials might be found lacking in value in a particular, but unknown, community.

Petitioners and respondent have both consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the First Amendment protects almost all speech, regardless of its "value," this Court has held that "obscenity" is one of the very rare, "well-defined and narrowly limited" exceptions to this rule.[1] In creating

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[1] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). In *Chaplinsky*, the Court indicated that "fighting words" and libelous speech are also not protected by the First Amendment. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court narrowed the latter exception, holding that only maliciously false

this exception, the Court has reasoned that society has a legitimate but qualified interest in prohibiting "offensive" and "prurient" sexual speech. Except in the context of "obscene" speech, offensiveness and prurience are not sufficient grounds to overcome First Amendment protection for speech.[2] But the Court has *also* found that the individual's interest in disseminating or receiving "obscene" speech is *de minimis* because its "value" is minimal.[3] Consequently, the Court has reasoned, the First Amendment does not shield a speaker of "valueless" obscenity from punishment for offending social norms of "offensiveness" and "prurience." Consistent with this reasoning, however, the Court has long held that if speech *does* have serious literary, artistic, political, or scientific value it is protected by the First Amendment even if the "average person" considers this valuable speech to be "offensive" and "prurient".[4]

This fundamental "value" principle is incorporated in the third prong of the obscenity test established in *Miller v. California*, 413 U.S. 15, 24 (1973). Under *Miller*, factfinders must look to the "average person, applying community standards" in applying the first two prongs to determine whether speech is offensive and appeals to prurient interests. But *Miller* does not require factfinders to use community standards when applying the value test. To the contrary, both *Miller* and subsequent decisions of this Court strongly suggest that *Miller*'s value test is *not* applied by reference to varying community

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defamatory speech is outside the protection of the First Amendment.

[2] *See Erznoznik v. Jacksonville*, 422 U.S. 205 (1975).

[3] *Roth v. United States*, 354 U.S. 476, 484-85 (1957); *Chaplinsky*, 315 U.S. at 571-72.

[4] *Miller v. California*, 413 U.S. 15, 24 (1973).

standards.[5] The view that the value test should not be applied by reference to community standards has overwhelmingly been adopted by lower courts and commentators.[6]

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[5] The Court's discussion of community standards in *Miller*, strongly suggested that those standards were relevant only in determining "what appeals to the 'prurient interest' or is 'patently offensive.'" 413 U.S. at 30. Subsequently, in *Smith v. United States*, 431 U.S. 291 (1977), the Court again indicated that prurience and offensiveness were to be determined by reference to community standards, but indicated that "[l]iterary, artistic, political, or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards." 431 U.S. at 301. In support of this distinction, the Court cited Professor Schauer's treatise, THE LAW OF OBSCENITY 123-124 (1976), where he explains that "[t]here has never been any indication by the Court that the merit of the material itself, as embodied in [the third prong of the *Miller* test], should or can vary from community to community. . . . Whether a work has literary, artistic, political, or scientific value, . . . unlike the prurient-interest and patent-offensiveness requirements, is not subject to the community-standards factor and is not affected by the change to local standards." *See* 431 U.S. at 301.

[6] *United States v. Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983); *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1363 (5th Cir. 1980), *cert. dismissed*, 447 U.S. 931 (1980); *United States v. Heyman*, 562 F.2d 316, 318 (4th Cir. 1977); *Tennessee v. Summers*, 692 S.W.2d 439 (Tenn. Cr. App. 1985); *Garcia v. Texas*, 633 S.W.2d 611, 613 (Tex. Ct. App. 1982), *overruled on other grounds, Davis v. State*, 658 S.W.2d 572 (Tex. Cr. App. 1983); *State v. Regan*, 640 P.2d 725, 731 (Wash. 1982) (Utter, J., concurring); *State v. Princess Cinema*, 292 N.W.2d 807, 811 (Wis. 1980); F. Schauer, THE LAW OF OBSCENITY 123-24 (1976); Hunsaker, *The 1973 Obscenity-Pornography Decisions: Analysis, Impact, and Legislative Alternatives*, 11 SAN DIEGO L. REV. 906, 916-17 (1974) (hereafter "Hunsaker"); Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 553-55 (1975) (hereafter "Lockhart"); Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C. L. REV. 1, 21 (1978) (hereafter "Schauer"); Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1854 (1975) (hereafter "*Com-*

Standing alone among all of the state and federal courts that have expressly resolved this issue,[7] the courts below held that Illinois' variant of *Miller*'s value test can constitutionally be applied by reference to community standards.[8] As *amici* will show in Point I, this departure from an otherwise unanimous body of case law does not adequately safeguard valuable speech and therefore violates the First Amendment.

Miller's value test performs a special and crucial function in protecting First Amendment interests, a function to which community standards are both irrelevant and inimical. The Court has authorized the use of community standards when applying *Miller*'s first two prongs because those prongs are aimed at determining whether there is a societal interest in prohibiting the speech at issue. Unlike the first two prongs, *Miller*'s value test is not designed to identify *societal* interests in prohibit-

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munity Standards"); Note, *Community Standards in Obscenity Adjudication*, 66 CAL. L. REV. 1277, 1286 & n.62 (1978) (hereafter "*Obscenity Adjudication*").

[7] At one time, the Wisconsin Supreme Court also took the view that *Miller's* third prong was to be applied by reference to community standards. That Court has now expressly repudiated that position. *State v. Princess Cinema*, 292 N.W.2d 807, 811 (Wis. 1980).

[8] The value test adopted in Illinois' obscenity statute has been interpreted to require that material be "utterly without redeeming social value," in order to be found obscene. Although this language is different from that employed in *Miller's* third prong, this difference does not make the use of community standards in the application of Illinois' test any less constitutionally infirm. The constitutional problems posed by the use of community standards in a test focusing on the value of speech stem from the majoritarian nature and inherent uncertainty and variability of community standards. Consequently, if this Court agrees with the overwhelmingly accepted view that *Miller's* value test cannot constitutionally be applied by reference to community standards, Illinois' reference to community standards in applying the Illinois variant of that value test is equally unconstitutional.

ing speech, but instead is intended to measure and protect the *individual*'s First Amendment interest in disseminating or receiving valuable speech. Community standards are not relevant to this interest, which is the individual's and arises from the federal Constitution. Indeed, because community standards are majoritarian in nature and necessarily vary among the thousands of communities in the United States, their use would completely undermine the function of *Miller*'s third prong, which is meant to safeguard interests that exist without reference to local majoritarian judgments. Moreover, the importance of applying the third prong on an objective basis is heightened by the application of community standards in *Miller*'s first two prongs; it is essential that the First Amendment protection afforded by *Miller* not be entirely dependent on the judgments and values of local majorities.

As *amici* will show, the decisions below are fundamentally at odds with four of the most basic principles of First Amendment law. *First*, by limiting the third prong's protection to speech that the average members of a particular community would find valuable, the Illinois courts have disregarded the central purpose of the First Amendment, which is to protect speech regardless of whether it is valued by the majority. *Second*, by making the basic values protected by the First Amendment a matter of local definition, the Illinois rule vitiates the concept of a "national Constitution" in which "fundamental First Amendment limitations . . . do not vary from community to community." *Miller v. California*, 413 U.S. at 30. *Third*, the Illinois rule completely undermines the third prong's critical role in safeguarding speech, by preventing meaningful judicial review of the jury's content-based determination of whether the speech has value. *Fourth*, the Illinois rule undermines the protection the third prong has afforded speakers who believe their speech has value by making that protection

dependent on compliance with thousands of varying and unarticulated community standards. Because speakers outside those communities cannot possibly ascertain those standards before speaking, the Illinois rule has a substantial chilling effect on speech that many individuals—including the average person in many or even most communities—would find valuable. For all of these reasons, the Constitution does not permit *Miller*'s third prong to be applied by reference to a patchwork of varying community standards.

In Point II, *amici* will urge the Court to limit its holding to the precise issue raised by this case, and to refrain from attempting further definition of the term "serious literary, artistic, political, or scientific value." That course is particularly appropriate in this case because these aspects of the value test are not even raised by the statutory variant of that test at issue here. If the Court does choose to address this issue, however, it should rule that because requiring sexually explicit speech to have value is itself an exception to the general rule that speech is protected regardless of its value, the value requirement must be narrowly construed.

ARGUMENT

I. THE LOWER COURTS' USE OF A COMMUNITY STANDARD IN APPLYING THE VALUE TEST VIOLATED THE FIRST AMENDMENT.

A. The First Amendment's Protection of Speech Cannot Be Conditioned on the Majority's Judgment That the Speech Has Value.

An instruction telling the jury to decide whether the "average person, applying contemporary community standards"[9] would find that the speech at issue had serious literary, artistic, political or scientific value, effectively requires the jury to evaluate the speech from

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[9] *See Miller*, 413 U.S. at 24.

the perspective of the majority in its community. Thus, as construed and applied by the courts below, *Miller*'s value test does not protect speech that even a substantial minority of the community considers valuable.

That ruling is contrary to basic First Amendment principles that this Court has repeatedly reaffirmed. As the Court emphasized in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), "[t]he very purpose of a Bill of Rights" was to place certain subjects "beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Indeed, in *Miller* the Court expressly stated that "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, *regardless of whether . . . a majority of the people approve of the ideas these works represent.*" 413 U.S. at 34 (emphasis added). *Miller* itself therefore envisions that although offensiveness or prurience may be dependent on local majoritarian sentiment, valuable speech does not lose its constitutional protection simply because its value is recognized only by a minority.

In a wide range of contexts the Court has held that speech must be protected from majoritarian hostility. For example, in *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959), the Court rejected the contention that a state obscenity statute was constitutional because it only proscribed speech that was contrary to the "moral standards, the religious precepts and the legal code" of the majority. The Court emphasized that the First Amendment's guarantee "is not confined to the expression of ideas that are conventional or *shared by a majority.*" 360 U.S. at 688-89 (emphasis added).[10]

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[10] *Accord Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("The First Amendment protects the rights of individuals to hold a point of view different from the majority."); *NAACP v. Button*, 371 U.S. 415, 445 (1963) (Constitution protects expression without

At least two rationales underlie these cases. Initially, as Justice Harlan explained in *Cohen v. California*, 403 U.S. 15 (1971), in a "society as diverse and populous as ours," the decision whether speech is valuable and worthy of consideration is left largely in "the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." 403 U.S. at 24. Thus, in *Hannegan v. Esquire*, 327 U.S. 146 (1946), the Court held that the Postmaster General could not deny lower mailing rates to a publication because of its allegedly poor taste, and explained that individuals should be free to judge for themselves whether speech is "trash" or has "enduring values":

> Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus & Adonis, or Zola's Nana. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values.

327 U.S. at 157. Justice Frankfurter, concurring in the judgment, observed that "the right of expression beyond

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regard to "the truth, popularity or social utility of the ideas and beliefs which are offered"); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (reversing conviction for breach of peace where the evidence "showed no more than that the opinions which [the defendants] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection"); *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting) (discussing the need to "preserve the right of free speech" from suppression by "well-meaning majorities").

the conventions of the day" is "the very basis of a free society." 327 U.S. at 160. *See also Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (the "right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes"). The protection afforded expression that may not be valued by the majority is also essential because "[w]e can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641-42 (1943).

The lower courts' ruling abandons these basic First Amendment principles. By restricting the protection of *Miller's* value test to speech that the majority of citizens in a particular community would find valuable, the Illinois rule has improperly denied that protection to a vast amount of speech that does have "serious literary, artistic, political, or scientific value." That result is neither required by, nor consistent with, *Miller's* value test. As Professor Schauer has observed, "the purpose of the obscenity laws is not to 'level' the available reading matter to the majority or lowest common denominator of the population. . . . It is obvious that neither *Ulysses* nor *Lady Chatterley's Lover* would have literary appeal to the majority of the population." F. Schauer, THE LAW OF OBSCENITY 144 (1976).[11]

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[11] As the history of obscenity regulation bears out, permitting the evaluation of speech to rely on contemporary community standards, poses particular dangers for speech that may be "ahead of its time." Professor Schauer notes that "[d]etermining which are the serious or important or valuable works of today . . . would be a simpler task if we could be sure that citizens of the future would not look back and criticize the suppression of great literature in 1975 in the same way that we in 1975 look back at 1925. But standards and values do change, and one of the great difficulties with obscenity laws lies in trying to locate and protect from regulation not only those works which are fully accepted by society today, but

The protection of the First Amendment clearly extends to speech the majority does not find to have value, and even to speech that is positively abhorrent to the majority. Accordingly, *Miller's* third prong cannot constitutionally be applied by reference to "community standards."

B. Although Community Interests in Suppressing Offensive" and "Prurient" Speech May Vary From Community to Community, the Individual's First Amendment Interest in Disseminating or Receiving Valuable Speech is the Same in Every Community.

As noted, it has long been established that except for certain "well-defined and narrowly limited classes of speech," *Chaplinsky*, 315 U.S. at 571-72, speech is constitutionally protected regardless of its "value." [12] These narrow classes, which include obscenity, are exceptions to this rule because the Court has found that such speech is almost completely lacking in value (rendering the individual's interest in the speech *de minimis*), *and* there is a strong societal interest in prohibiting such speech.[13]

The first two prongs of the *Miller* test, which ask whether the speech is "patently offensive" and appeals to shameful or morbid interests in sex,[14] are aimed at deter-

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also those which might be fully accepted in 10 years." F. Schauer, THE LAW OF OBSCENITY 136 (1976).

[12] *See, e.g., Cohen v. California*, 403 U.S. 15, 25 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964); *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Winters v. New York*, 333 U.S. 507, 510 (1948).

[13] *See Miller*, 413 U.S. at 20-21; *Roth*, 354 U.S. at 484-85; *Chaplinsky*, 315 U.S. at 571, 572.

[14] In *Miller*, the Court used the term "prurient interest." 413 U.S. at 24. The Court has recently explained that this refers to a shameful or morbid interest, not a "normal" or "healthy" interest in sex. *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2799 (1985).

mining whether there is a legitimate *societal* interest in *prohibiting* the speech at issue. Not surprisingly, the Court has indicated that community considerations may be relevant to these inquiries.[15] Thus, in deciding whether speech is "patently offensive," reference to community standards permits the jury to determine whether the speech implicates the relevant interests of the affected community. By allowing the offensiveness issue to be judged in this manner, the Court has been able to accommodate the varying interests that different communities may have in regulating sexually explicit speech.[16] Similarly, use of community standards in deciding whether the speech appeals to a "shameful" or "morbid" interest in sex, allows the jury to focus on what the affected community considers shameful or morbid, and also to focus on the particular audience the speech was designed to reach.[17]

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[15] However, many commentators have questioned the use of community standards in applying *any* of *Miller's* three prongs. *See, e.g.*, Schauer, *supra* note 4; Hunsaker, *supra* note 4, at 933.

[16] In explaining why state community standards can be used to determine whether speech is patently offensive and appeals to prurient interests, the Court in *Miller* emphasized the importance of accommodating these diverse interests. *Miller*, 413 U.S. at 32 ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."). In *Smith*, the Court again indicated that there are local interests in the regulation of offensive and prurient sexually explicit speech, and explained that these interests are "fully satisfie[d]" by "the jurors' application of contemporary community standards." 431 U.S. at 304 n.10.

[17] *See Mishkin v. New York*, 383 U.S. 502, 509 (1966). The Court has indicated that reference to "community" standards is also designed to prevent jurors from imposing their *personal* views or the views of an unusually sensitive person. *Roth*, 354 U.S. at 489; *see Miller*, 413 U.S. at 33. To that extent, the use of "community" standards, rather than the jurors' own personal standards, might be viewed as safeguarding protected speech. This view is necessarily based on the questionable assumptions that "community"

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The Court has never suggested, however, that community standards have any relevance to the value test in *Miller*'s third prong. That test requires the court to determine whether certain basic and fundamentally important First Amendment interests—the right to speak and receive speech that has serious literary, artistic, political, or scientific value—are implicated by the speech in question. If these paramount individual interests are implicated, that speech is protected by the First Amendment.

The lower courts' ruling would make this central constitutional inquiry dependent on varying community standards.. As a consequence, the individual's basic First Amendment interest would depend largely on the community in which the individual speaks or receives speech, varying widely and unpredictably among the thousands of diverse communities across the United States.

Although such variation may be a regrettable but necessary concomitant of the first two prongs (because they measure the different interests that communities have in prohibiting speech), variation is clearly impermissible in determining whether the basic First Amendment interests protected by the third prong are implicated. In *Miller*, for example, the Court expressly stated that "[u]nder a national Constitution, fundamental First

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standards are more protective of speech than the "personal" standards of jurors, and that an instruction can succeed in preventing jurors from applying their personal standards. Even if these assumptions were correct, it is clear that whatever protective value use of community standards may have is overwhelmingly outweighed by the host of problems that it creates. First Amendment values would be far better served by directly instructing jurors not to rely on their personal opinions (or the opinions of unusually sensitive persons), and also to consider other evidence such as the judgment of experts. In short, use of community standards in the first two prongs cannot be justified as serving First Amendment goals, but only, as explained above, as identifying majoritarian interests in the suppression of speech.

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Amendment limitations on the powers of the States do not vary from community to community." *Miller*, 413 U.S. at 30. *See also Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Jacobellis v. Ohio*, 378 U.S. 184, 194 (1964); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).[18] As the Court has long recognized:

> While the people of the state may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede . . . .

Holden v. Hardy, 169 U.S. 366, 389 (1898).

Because the First and Fourteenth Amendments do not envision that those "fundamental principles" will vary according to the importance attached to them by thousands of local communities, the lower courts' ruling should be reversed.

C. The Lower Courts' Ruling Would Prevent Meaningful Judicial Review of the Jury's Content-Based Determination That the Speech Lacks Value and is Therefore Unprotected by the First Amendment.

In First Amendment speech cases, it is well-established that appellate courts, including this Court, must independently review jury findings of constitutional fact.[19] This requirement "reflects a deeply held conviction that judges—and particularly members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp v. Consumers Union of United States*, 466 U.S. 486, 510-511 (1984). The Court has consistently reaffirmed this rule in obscenity cases, where the line between constitutionally protected speech and obscenity is "dim and uncertain," *Bantam Books v. Sullivan*, 372

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[18] *Accord* F. Schauer, THE LAW OF OBSCENITY 124 (1976).

[19] *See, e.g., Time v. Pape*, 401 U.S. 279, 284 (1971); *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964).

U.S. 58, 66 (1963), and therefore the need for effective review of findings of constitutional fact is particularly acute. *See Miller*, 413 U.S. at 25 (recognizing "the ultimate power of appellate courts" to protect First Amendment values in obscenity cases).[20] In particular, the Court has emphasized the role of appellate courts in assuring the proper application of *Miller's* value test, instructing that "*courts* must always remain sensitive to any infringement of genuinely serious, literary, artistic, political or scientific expression." *Miller*, 413 U.S. at 23 (emphasis added). *See also Smith v. United States*, 431 U.S. 291, 305 (1977).

Because of the special role of juries in identifying "community standards" in a particular locale, the use of community standards in *Miller's* value test would almost totally disable courts from reviewing a jury finding that speech does not have value. The Court has held that in determining the "community standard", the jury is permitted to rely on its own knowledge of the community.[21] It has suggested that because of this knowledge juries may reject *any* and *all* evidence in the record pertaining to community standards.[22] Because the most critical "evi-

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[20] *Accord Jenkins v. Georgia*, 418 U.S. 153, 160 (1974); *Kois v. Wisconsin*, 408 U.S. 229 (1972) (*per curiam*).

[21] In determining the community standard the "juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination . . . ." *Hamling v. United States*, 418 U.S. 87, 104-05 (1974); *Smith v. United States*, 431 U.S. at 302. Even though the allegedly obscene material itself provides no evidence of the community's standard, if that material is placed into evidence no additional proof is required for the jury to find that the material is obscene. *Kaplan v. California*, 413 U.S. 115, 121 (1973); *Paris Adult Theatre v. Slayton*, 413 U.S. 49, 56 (1973).

[22] *See, e.g., Smith v. United States*, 431 U.S. 291, 297 (1977) (upholding jury finding that material was patently offensive and appealed to prurient interests in sex even though jury rejected undisputed evidence pertaining to community standards).

dence" of community standards (the jury's own knowledge) is not a part of the record, because whatever evidence is in the record often provides little basis for discerning the community standard,[23] and because juries need not articulate how they identified the standard they applied, appellate courts cannot meaningfully review jury determinations of community standards. Moreover, because juries are not required to articulate the community standard they have applied, appellate courts cannot even know which community standard was applied by the jury, and consequently have no way to determine whether that standard was *properly* applied to the speech at issue.[24]

Although any rule that prevents judicial review of the jury's findings of constitutional fact in speech cases would violate the First Amendment, such a rule is especially troublesome when the jury is making a content-based judgment about speech. Content-based distinctions

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[23] *See Paris Adult Theatre*, 413 U.S. at 56 n.6.

[24] *See Smith v. United States*, 431 U.S. at 315-16 (Stevens, J., dissenting) ("[B]ecause the record never discloses the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court."); *United States v. 2,200 Paper Back Books*, 565 F.2d 566, 570 n.7 (9th Cir. 1977); *Community Standards*, *supra* note 6, at 1844; Lockhart & McClure, *Censorship Of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 1, 112-13 (1960); *Obscenity Adjudication*, *supra* note 6, at 1290.

Hence, if community standards were employed in all three of *Miller's* prongs, judicial review of the jury's application of those prongs would be limited to determining whether the speech depicted "hard core" sexual conduct. If it did, the jury's application of the *Miller* prongs could only be reversed if the reviewing court were to *disregard* the jury's determination and application of the community standard and decide that *no* community could constitutionally find that the speech at issue was patently offensive, appealed to prurient interests, and lacked serious value. Review on this very limited and *ad hoc* basis neither adequately safeguards First Amendment rights nor contributes to the evolution of workable legal principles.

have always been presumptively unconstitutional and subject to this Court's closest scrutiny.[25] Moreover, because juries may not be sufficiently sensitive to the values protected by the First Amendment (and in particular may punish speech simply because it is unpopular), the Court has rejected otherwise constitutional legal rules because they posed an undue risk that jury findings would be influenced by the content of speech. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971); *Bose Corp. v. Consumers Union*, 466 U.S. 486, 510 (1984).

The value test incorporated in *Miller's* third prong, however, not only makes it *possible*, but explicitly *requires* the jury to assess the content of speech. The Court's longstanding recognition that content-based judgments create grave risks to First Amendment liberties compels the conclusion that the jury's application of this test must be subject to meaningful judicial review. The lower courts' use of a community standard in the application of the value test, however, would have precisely the opposite result, rendering the jury's content-based determination effectively unreviewable.

Although the problem of unreviewability is also posed by the use of community standards in *Miller's* first two prongs, this makes it even more essential that the third prong be applied in a manner that permits effective appellate review. Indeed in *Smith*, after observing that *Miller* had not discussed the third prong "in terms of contemporary community standards," 431 U.S. at 301, the Court rejected the contention that the jury's obscenity finding was not reviewable, relying in significant part

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[25] *City of Renton v. Playtime Theatres Inc.*, 54 U.S.L.W. 4160, 4161 (1986); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455, 462-63 & n.7 (1980); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563 n.6 (1980); *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976).

on the rationale that the third prong "is particularly amenable to appellate review." 401 U.S. at 305.

Moreover, although appellate review of the application of all three prongs is important, the abrogation of appellate review with respect to the third prong's value test has the most serious consequences, because it is that test which assures protection of *valuable* speech, deemed by *Miller* to be of transcendent First Amendment importance. If the jury mistakenly determines that the speech at issue does not have value, then speech which should be protected by the First Amendment will be suppressed and the speaker punished, with far-reaching chilling effects on the dissemination of other valuable speech. If, on the other hand, the value test is correctly applied, an error in the application of the first two prongs that results in an incorrect finding that speech is obscene will not suppress speech that does have value. Careful judicial review to minimize the risk of erroneous factual findings is therefore critically important in the context of *Miller*'s third prong.

D. Applying the Value Test by Reference to Varying Community Standards Would Substantially Chill Speech That Has Serious Literary, Artistic, Political or Scientific Value.

In the many cases in which it has confronted problems raised by the regulation of obscenity, this Court has consistently ruled that the standards and procedures for distinguishing between protected and unprotected speech must be carefully drawn in order to assure that laws aimed at suppressing obscene speech will not also punish or chill speech protected by the First Amendment.[26] As we will show, the lower courts' adoption of

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[26] *See Roth v. United States*, 354 U.S. 476, 488 (1957); *Miller*, 413 U.S. at 23-24; *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975); *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); *A Quantity*

a community standard for determining whether speech has value is inconsistent with that rule, and will assuredly have a substantial chilling effect on speech that has serious literary, artistic, political or scientific value.

If laws authorizing criminal punishment for individuals engaging in unprotected speech do not provide adequate notice of the speech proscribed and allow a significant margin for error, then speakers will steer a very wide course away from the "unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). This self-censorship is "a censorship affecting the whole public . . . . Through it, the distribution of all books, both obscene and not obscene, would be impeded." *Smith v. California*, 361 U.S. 147, 153-54 (1959). *See New York Times v. Sullivan*, 376 U.S. at 279-80.

The Court has long recognized the serious danger of self-censorship in the obscenity context, where the line between unlawful "obscenity" and constitutionally protected speech is unavoidably "dim and uncertain." *Bantam Books*, 372 U.S. at 66. That danger would be greatly aggravated if the value test were applied by reference to unarticulated and varying community standards.

For all speakers, but particularly those who live outside the relevant community, and national speakers who communicate in thousands of communities, the use of community standards makes it extraordinarily difficult, and in many cases impossible, to ascertain the "unlawful zone" of obscene speech. In discussing community standards, this Court's decisions have emphasized the great diversity of communities across this Nation [27] and have acknowledged that in identifying a particular community's standards each jury must "draw on knowledge of

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of Copies of Books v. Kansas, 378 U.S. 205, 212 (1964); *Marcus v. Search Warrants of Property*, 367 U.S. 717, 731 (1961); *Smith v. California*, 361 U.S. 147, 155 (1959).

[27] *Miller*, 413 U.S. at 30.

the community or vicinage from which [it] comes." [28] This knowledge obviously is not possessed by speakers outside the community and cannot practically be obtained. Indeed, the relevant community is not even specified in many state obscenity statutes.[29] Even in states that do specify a geographic community, those communities inevitably include countless subcommunities, and the speaker cannot know which of those subcommunities the jury may look to for guidance.[30]

In deciding whether or how to speak in a particular community, the speaker knows that a *single* mistake in ascertaining the standards of that community will subject the speaker to criminal penalties. To minimize that risk, speakers must steer a wide course away from the "dim and uncertain" line separating obscenity and protected speech in the many communities in which they are uncertain about the "community standard." In those communities, the speaker must operate under a presumption of community intolerance, limiting speech to

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[28] *Hamling*, 418 U.S. at 105; *see* note 21 *supra*.

[29] *See Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (states may refer to community standards "without further specification").

[30] *See, e.g.*, Bell, *Determining Community Standards*, 63 A.B.A.J. 1202, 1206 (1977) (This analysis of community standards polls "found that attitudes regarding the depiction of sexual matters vary markedly from one location in a city to another. For example, in one city there were residential areas where 90 per cent of the respondents felt that standards had changed in the past few years in the direction of greater acceptability regarding explicit sexual depictions in films. In the same city there were areas where only 20 per cent of the respondents noticed a change toward greater tolerance. Indeed, half of those respondents thought the changes were in the opposite direction."); *Court v. State*, 63 Wis.2d 570, 217 N.W.2d 676, 679 (1974) ("The Appleton area where this case originated as well as the obvious example of Milwaukee are areas where portions of what clearly are recognizable as integrated local communities would be governed by different standards. What would not be obscene on one side of the street might be obscene on the other.").

that which is accepted in the least tolerant communities —in other words, the lowest common denominator. Rather than accommodating the interests of diverse communities, the use of community standards effectively imposes on *all communities* the standards of the least tolerant.[31]

These difficulties acutely affect the practices of national speakers, such as national publishers and distributors of books. By entering the national marketplace of ideas, these speakers play a critical role in fostering the exchange of ideas between diverse communities.[32] But when confronted with the risk of criminal penalties for violating any of the thousands of unarticulated and varying community standards, they are forced to engage in self-censorship, avoiding speech in all communities

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[31] *See Community Standards, supra* note 6, at 1859 n.91 ("taken to extremes, least common denominator distributions create a uniform national standard—the standard defined by the attitudes of the least tolerant jurisdiction"). In addition to subjecting speakers to thousands of different standards, the use of community standards has a chilling effect on protected speech for other reasons. First, it creates a strong incentive for prosecutors to "forum shop" by commencing prosecutions in those areas with the least tolerant "community standards." Consequently, unless an objective standard is used speakers must assume that the value of their speech will be judged by the most parochial standards. Second, the use of community standards in the third prong would mean that an acquittal based on a finding of "value" in one community would have no collateral estoppel effect in a prosecution commenced in another community. Community standards thus increase the risk that a speaker will be subjected to multiple prosecutions. Because speakers cannot assume that no prosecutors will take advantage of these opportunities, the pressure to self-censor any speech that might be found obscene anywhere becomes even greater.

[32] *See Roth*, 354 U.S. at 484; *Associated Press v. United States*, 326 U.S. 1, 20 (1944); *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

that might approach the "dim line" between obscenity and constitutionally protected speech in any community.[33]

This chilling of constitutionally protected speech is caused by the use of community standards in deciding any of *Miller*'s three prongs. However, use of an objective standard in applying the third prong affords significant protection to speakers. If they can conclude that their speech clearly has "value" of the type specified in *Miller*—based on their own judgment, consultation with experts or law enforcement officials, or an examination of case law involving the same or similar speech—they can have *some* assurance that their speech will be constitutionally protected, no matter how idiosyncratic a particular community's standards concerning the "prurient interests" and "patently offensive" prongs may be. This limits, somewhat, the chilling effect on "valuable" speech of varying community standards.

Because the lower courts' ruling removes this protection, even those who engage in sexually explicit speech which they honestly believe has value cannot safely speak anywhere they are uncertain of the community's standards. The courts below have not provided the slightest justification, much less a compelling or overriding justification, for adopting a rule that predictably will lead to substantial self-censorship of protected—indeed of *valuable*—speech. That rule is fundamentally at odds with the First Amendment.

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[33] The recent decision in *Mozert v. Hawkins County Public Schools*, —— F. Supp. —— (E.D. Tenn., No. Civ-2-83-401, Oct. 24, 1986), 55 U.S.L.W. 2243 (Nov. 4, 1986) (permitting children to be excused from reading textbooks they and their parents find objectionable on religious grounds) has focused attention on the pressure to self-censor experienced by publishers in a national market. Even in textbook publication, where deviations from what is "valued" in diverse communities are not subject to criminal penalties, there has been widespread concern that textbooks are being "watered down" because they are "aimed at satisfying many and offending none." *Wash. Post*, Nov. 10, 1986, at A1.

II. THE COURT SHOULD LIMIT ITS HOLDING TO THE PRECISE ISSUE RAISED BY THIS CASE, BUT IF IT ADDRESSES OTHER ASPECTS OF THE VALUE TEST IT SHOULD RULE THAT BECAUSE THE VALUE REQUIREMENT IS AN EXCEPTION TO THE GENERAL RULE THAT SPEECH IS PROTECTED REGARDLESS OF ITS VALUE, THAT REQUIREMENT MUST BE NARROWLY CONSTRUED.

Amici respectfully submit that it would be unnecessary and inappropriate for the Court to address the precise meaning of "serious literary, artistic, political, or scientific value," in this case because that issue is not before the Court. If, however, the Court does address that issue, it should rule that because requiring sexually explicit speech to have value is itself an exception to the general rule that speech is protected regardless of its value, the value requirement must be narrowly construed.

The precise meaning of "serious literary, artistic, political, and scientific value," was not at issue below and is not raised in these appeals. Indeed, the *Miller* language is not even used in the Illinois test that is at issue. Hence, elaboration of that language would provide no guidance to the courts below if this case is remanded for further proceedings.

In these circumstances, it is axiomatic that the Court should not elaborate the meaning of "serious literary, artistic, political, and scientific value" in this case. The importance and complexity of constitutional adjudication require that the Court limit its decision to those issues properly and necessarily before it. Perhaps nowhere is this more evident than in obscenity cases, where the difficulty of the issues has frequently resulted in sharp divisions among the members of this Court. Issues raised by the phrase "serious literary, artistic, political and

scientific value" are no exception. They must be resolved on a case-by-case basis in the context of specific disputes, rather than through broad rules formulated in the abstract, without the benefit of briefing by the parties or resolution in the first instance by lower courts. Hence, the Court's holding should be limited to requiring that the value test (or variants of that test) must be applied using an objective standard, and the Court should await a more appropriate case before addressing other substantive aspects of that test.

If the Court does decide to provide further instruction concerning the interpretation and application of the "serious literary, artistic, political, and scientific value" test, however, it should rule that because this requirement is an exception to the general rule that speech is protected regardless of its value, the value requirement must be narrowly construed. The history of speech regulation teaches that any effort to identify speech that is not "valuable" should proceed with an awareness that it is extraordinarily difficult to make this determination using neutral principles, and that the principal victims of such efforts are often the speaker and recipient of unconventional or unpopular ideas. These lessons are deeply rooted in the Court's First Amendment jurisprudence, and are of paramount importance in the rare cases—such as obscenity—where the First Amendment has been construed to allow criminal punishment of speech based on its content and lack of "value."

In view of these principles, if the Court addresses the substance of the value test, *amici* urge it to do so in the following manner:

First, the Court should indicate that the four categories of "valuable speech" enumerated in *Miller* are not exhaustive, and should be construed flexibly.[34] Any at-

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[34] *See* Lockhart, *supra* note 6, at 555 (The four categories enumerated in *Miller* are "artificially limited in scope, apparently ex-

tempt to rigidly define "core" categories of speech protected by the First Amendment is ultimately doomed to failure. The interests protected by the Amendment are too broad, and the contexts in which they arise too varied, to allow such compartmentalization.[35] For example, a significant amount of educational speech, including sex education of an informational rather than scientific nature, would not easily fall within any of *Miller*'s four categories (and clearly would not be included if they are rigidly construed).[36] The *Miller* test,

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cluding important first amendment values . . . . [T]he omission of educational value, and some general expression such as 'other social value' to include genuine serious values that do not readily fit into the specified categories, is a critical deficiency in the [*Miller*] opinion.").

[35] Thus, in some cases, courts may need to consider a variety of contextual factors to determine whether speech is valuable. *See Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (*per curiam*) (in deciding whether speech is obscene, "[a] reviewing court must . . . look at the context of the material, as well as its content"); *Ginzburg v. United States*, 383 U.S. 463 (1966) (same). In a close case, for example, the fact that the material was expressly requested by the recipient, and paid for, would provide some indication of its value, and conversely the fact that it had been "thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials," *Miller*, 413 U.S. at 19, might provide some evidence that it was not valuable.

[36] *See* Lockhart, *supra* note 6, at 555 ("[E]ducational value [is] one of the prime first amendment values served by explicit sexual materials, which are now widely used in the more advanced types of sex education in private schools and churches, and in the training of sex counselors, doctors, and others."). In assessing the value of the material at issue in *Ginzberg v. United States*, 383 U.S. 463, 472 (1966), the Court emphasized that the material was not being distributed because of its "therapeutic or educational value," and noted that "[t]he Government does not seriously contest the claim that the book [would have] worth in such a controlled, or even neutral, environment." *See* Hunsaker, *supra* note

therefore, should leave lower courts some room to accommodate other important values protected by the First Amendment in appropriate cases.

Second, the Court should reaffirm the statement in *Roth* that sexually explicit speech is not *per se* lacking in value simply because its content pertains exclusively to sex. *See Roth*, 354 U.S. at 487 ("Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.").

Third, the Court should make clear that the word "serious" as used in *Miller*'s third prong does not require a *quantitative* judgment about the value of speech, but requires instead the judgment whether the speech *genuinely* has literary, artistic, political, or scientific value. *See Miller*, 413 U.S. at 23 ("courts must always remain sensitive to any infringement of *genuinely* serious, literary, artistic, political or scientific *expression*") (emphasis added).[37] In rejecting as not embodying the views of the Court's majority in any prior case the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (plurality opinion), and substituting its "serious . . . value" test, the *Miller* Court relied upon *Kois v. Wisconsin*, 408 U.S. 229 (1972) (*per curiam*), for the proposition that " '[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.' " 413 U.S. at 25 n.7 (quoting 408 U.S. at 231). Thus, *Miller*'s insertion of the word "serious" and rejec-

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6, at 916 (suggesting that material, otherwise obscene, may have "serious 'therapeutic' value in psychiatric treatment or in marriage counseling.").

[37] *See Community Standards*, *supra* note 6, at 1855 (advocating this interpretation of *Miller*).

tion of the plurality's test in *Memoirs* reaffirmed and embodied the principle of *Kois* that courts may find a work obscene only if any and all portions having value are merely a sham, lacking any rational relationship to the remainder of the work.[38] It does *not*, however, invite juries or judges who have found, for example, that material has genuine political value to adjudge further whether that political value exceeds some artificially established (and meaningless) quantum before it merits First Amendment protection. A quantitative rule would unduly risk the worst sorts of content- and viewpoint-based discrimination by the jury.

Fourth, for reasons indicated earlier, the Court should reaffirm the critical role played by judges in determining whether material has "serious literary, artistic, political or scientific value." [39]

CONCLUSION

In contrast to the many difficult and divisive issues that arise in the obscenity context, the issue now before the Court has been resolved with virtual unanimity by the lower courts. The Illinois courts departure from that otherwise unanimous view is inconsistent with the very design of the *Miller* test and violates four of the most fundamental principles of First Amendment jurisprudence, each of which requires the conclusion that *Miller*'s value test cannot constitutionally be applied by reference to community standards. Considered together,

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[38] *See Kois v. Wisconsin*, 408 U.S. at 231 (publication of sexually explicit photographs was constitutionally protected because it was "rationally related to an article that itself was clearly entitled to the protection of the Fourteenth Amendment").

[39] *See Smith v. United States*, 431 U.S. 291, 305 (1977); F. Schauer, THE LAW OF OBSCENITY 151 (1976).

those principles overwhelmingly justify that conclusion and require reversal of the judgment below.

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